

2016

## The Turn to Procedure

Kunal M. Parker

*University of Miami School of Law*, [kparker@law.miami.edu](mailto:kparker@law.miami.edu)

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

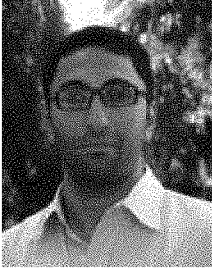
Kunal Parker, *The Turn to Procedure*, JOTWELL (June 13, 2016) (reviewing Daniel R. Ernst, **Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940**(2014)), <http://lezalhist.iotwell.com/the-turn-to-procedure/>.

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# The Turn to Procedure

<http://legalhist.jotwell.com/the-turn-to-procedure/>

Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940* (2014).



Kunal Parker

Daniel Ernst's book, *Tocqueville's Nightmare: The Administrative State in America*, is a significant addition to the growing literature on the history of the administrative state. However, it also compels a rethinking of the received historiography of twentieth century American legal thought. It is to the latter contribution that I will devote this brief review.

When Alexis de Tocqueville visited the United States in the 1830s, he observed that the country—in contrast to the states of continental Europe—had very little in the way of centralized bureaucracy. This, for Tocqueville, was a good thing: powerful centralized bureaucracies threatened a significant abridgment of democracy in a country as diverse and spread out as the United States. The “Tocqueville’s nightmare” of Ernst’s title refers, then, to the situation in which too much power might become vested in the hands of bureaucrats unanswerable to the people.

Beginning in the late nineteenth century, the first federal bureaucracies began to emerge in the United States. By 1940, a vast centralized administration had developed. This was in large part a result of the efforts of early twentieth century reformers, who called for systematic, scientific, bureaucratically-managed resolutions of the country’s economic and social problems. But the shadow of “Tocqueville’s nightmare” fell over the new administrative state. Many worried that the United States had shrugged off “the despotism of a *supreme* autocrat” only to make way for “the *petty* despotism which may come from vesting final discretion to regulate individual conduct in the hands of lesser officials” (P. 1; emphasis in original). How was this “nightmare” to be averted?

Ernst argues that the “nightmare” was averted because Americans—in a gesture Tocqueville identified as characteristic of American political culture—turned to the courts. Ernst traces meticulously how the courts—and law in general—structured the new administrative state. During the first half of the twentieth century, courts repeatedly refused to surrender their right to hold administrators accountable; demanded that administrators adhere to norms of due process in administrative proceedings; and insisted that administrators assume a quasi-judicial impartiality vis-à-vis subordinates who argued cases on behalf of the government. Indeed, according to Ernst, the courts’ influence on the administrative state “went beyond the structure of an agency; it reached deep into the thought processes of administrators and taught them to justify their actions in a particularly legalistic way.” (P. 3.) The distinctly legalistic cast of the American administrative state distinguished it, Ernst maintains, from its far less restrained and far more dangerous contemporaries in Hitler’s Germany, Mussolini’s Italy, and Stalin’s Soviet Union. At the same time, the country’s common lawyers, traditionally more comfortable arguing before judges than making their case before bureaucrats, shed their hostility towards the latter and developed lucrative specialized practices that involved close relationships with agencies.

This narrative, fascinating in its own right, raises all sorts of questions for the historiography of American legal thought. An important origin point for the historiography of twentieth century American legal thought is the case of *Lochner v. New York* (1905), in which the U.S. Supreme Court read common lawyerly ideas of freedom of contract into the Due Process Clause of the Fourteenth Amendment in order to strike down a New York law that established the maximum length of the work day in the baking trade. *Lochner*, and other cases like it, incensed Progressive-era critics of the federal courts. These critics argued that unelected, conservative, common lawyerly federal judges were reading their political preferences into “law” and thereby encroaching on the turf of democratic “politics,” denying democratic majorities the right to govern themselves. In making such arguments, these critics of the courts were joining forces with an ongoing philosophical critique of law. Beginning in the late nineteenth century, pragmatic legal thinkers such as Oliver Wendell Holmes, Jr. had argued that law’s foundations in logic, morality, reason, and so on were essentially spurious. Because “law” could not meaningfully distinguish itself from “politics,” Holmes appeared to argue, common law judges should cede control over law-making to the forces of democratic “politics.”

We often tell the history of American legal thought in the first half of the twentieth century as a history of the retreat of “law” before the advance of democratic “politics.” The New Deal, accompanied by the U.S. Supreme Court’s decision to rethink its position in *Lochner*, represents the triumph of democratic “politics,” the displacement of law generated by a common lawyerly judiciary by law generated by legislatures and the administrative agencies they created.

Ernst’s book complicates this story considerably. If one follows the implications of his account, the story of the contest between “law” and democratic “politics” in the first half of the twentieth century is not any simple story of the *retreat* of “law” before the forces of democratic “politics.” It is instead a story of how “law,” by giving up its ability to check democratic “politics” on substantive grounds, instead suffused democratic “politics”—one important locus of which was the new administrative state—by becoming *procedure*. Through his study of politics of the early twentieth century administrative state, Ernst thus gives us rich substantive account of one important site of the changing career of “law” in relationship to democratic “politics,” of its emerging ontology as procedure.

The idea that law in the early twentieth century would transform itself into procedure as it ceded ground to the new expert knowledges of the administrative state is made clear in the writings of Felix Frankfurter, an important intellectual architect of the American administrative state and someone who features prominently in Ernst’s book. Towards the end of his career, Frankfurter recalled something he had written in the summer of 1913, as he contemplated taking up a teaching position at the Harvard Law School. In his recollection, we have a breathtakingly clear understanding of the new procedural conception of law:

The problems ahead are economic and sociological, and the added adjustments of a government under a written constitution, steeped in legalistic traditions, to the assumption of the right solution of such problems. To an important degree therefore, the problems are problems of jurisprudence,—not only the shaping of a jurisprudence to meet the social and industrial needs of the time, *but the great procedural problems of administration and legislation, because of the inevitable link between law and legislation, the lawyers’ natural relation to these issues, the close connection between all legislation and constitutional law, and the traditional, easily accountable dominance of the lawyer in our public affairs. In the synthesis of thinking that must shape the Great State, the lawyer is in many ways the coordinator, the mediator, between the various social sciences* (emphasis added).<sup>1</sup>

Ernst’s account of how law suffused the new administrative state is offered as a corrective to the Tea Party

movement's view that that Americans in the early twentieth century abandoned the country's tradition of individualism when they built up the administrative state. Instead, Ernst wants to show that "the reformers who supposedly sent the Constitution into exile . . . actually designed the principles of individual rights, limited government, and due process into the administrative state" (Pp. 7–8.)

As a corrective to the Tea Party's simplistic view of America's past, Ernst's account is indeed valuable. It is important to emphasize, however, that the transformation of law's ontology into procedure in the early twentieth century was a complex and variegated affair, pointing in many different directions. The career of Felix Frankfurter, who was an ardent New Dealer and then a kind of proceduralist conservative on the Warren Court, suggests how complicated the various strands of law's self-transformation into procedure could be. In *Tocqueville's Nightmare*, Ernst is not concerned with exploring these issues. But his book is enormously suggestive. As such, it deserves a wide readership.

- 
1. Felix Frankfurter & Harlan B. Phillips, *Felix Frankfurter Reminisces; Recorded in Talks with Dr. Harlan B. Phillips* 81 (New York: Reynal & Company, 1960). [?]

Cite as: Kunal Parker, *The Turn to Procedure*, JOTWELL (June 13, 2016) (reviewing Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940*(2014)), <http://legalhist.jotwell.com/the-turn-to-procedure/>.